# DEPARTMENT OF STATE

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## CAUTION - FUTURE RELEASE

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ADDRESS BY THE HONORABLE ABRAM CHAYES,
THE LEGAL ADVISER, DEPARTMENT OF STATE,
AT THE TENTH REUNION OF THE HARVARD LAW
SCHOOL CLASS OF 1952, AT THE HARVARD CLUB
IN BOSTON, MASSACHUSETTS, SATURDAY,
NOVEMBER 3, 1962 AT 8:00 P.M., E.S.T.

The Cuban crisis is not over yet. It may be a very long time before it is over. And such progress as we have made, cannot, on the whole, be attributed to our legal position. The primary elements in the confrontation of the last weeks have been the ability and the will of the United States to deploy the necessary force in the area to establish and enforce the quarantine, and the mobilization of friends and allies -- in the hemisphere, in Europe and elsewhere in the world -- in support of our action.

But if it would not have been enough merely to have the law on our side, that is not to say it is wholly irrelevant which side the law was on. The deployment of force, the appeal for world support, to say nothing of the ultimate judgment of history all depend in some significant degree on the reality and coherence of the case in law for our action.

It is worthwhile I think to set out that legal case and to examine some of its implications.

The question was not, as most of my friends in and out of the press seemed to think, "Is it a legal blockade?" The effort to name and classify things has its place in the law as in other disciplines, but this audience needs no reminder that legal problems are something more than a search for pigeonholes within which to encase living phenomena.

In wartime, the establishment of a blockade, of course, with all its classical elements, is justified according to the books. It represents minimal interference with neutral commerce consistent with the necessities of war. But even in the most hallowed of the texts, war is not the sole situation in which such interference is permissible.

It is instructive to examine the rules of blockade. They were developed in the 19th Century. They reflect very accurately the problems of the international order -- as well as the weapons technology -- that then prevailed. The typical subjects of international law were European nation-states. Their relations with each other were episodic and largely bilateral.

The age of total war was only beginning, so the application of force as an instrument of national policy was recognized as legitimate, if not positively beneficial. When force was applied it was, at least in theory, a bilateral affair, or at most something between small and temporary groupings of nations on each side. The operating legal rules -- always nicer and more coherent in retrospect than at the time -- had two principal objects: First, to help assure that these affrays were carried out with the smallest disturbance of the normal activities of all concerned. And second,

second, to permit a state to make an unambiguous choice whether to join with one of the belligerents and so have a chance to share in any political gains, or to remain uninvolved and make its profits commercially, which were in any event likely to be both larger and safer.

International law addresses different problems today and in a different context. Its overriding object is not to regulate the conduct of war but to keep and defend the peace. If non-alignment continues to be a goal for some countries, non-involvement has become a luxury beyond price. We remember that war in this century has twice engulfed us all, willy nilly. Paper commitments to right conduct did not stop it. Above all we are burdened with the knowledge and the power to destroy the world. The international landscape today, too, looks quite different than it did a century ago. It is peopled with permanent organizations of states -- some more comprehensive, some less, some purely for defense and some with broader purposes. It is through these organizations that we hope to give reality to our pledges to maintain the peace.

The Soviet Union's threat in Cuba was made in the context of this international system and it was answered in the same context.

The United States saw its security threatened, but we were not alone. Our quarantine was imposed in accordance with the recommendation of the Organization of American States acting under the Rio Treaty of 1947. This Treaty, together with related agreements, constitute the Inter-American System. Twenty-one countries, including Cuba, are parties to that Treaty. None has ever disaffirmed it.

The Rio Treaty provides for collective action not only in the case of armed attack but also "if the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected . . . by any . . . fact or situation that might endanger the peace of America . . ." In such cases, a special body, the Organ of Consultation, is to "meet immediately in order to agree on the measures . . . which must be taken for the common defense and for the maintenance of the peace and security of the Continent." The Organ of Consultation acts only by a two-thirds vote.

The Treaty is explicit as to the measures which may be taken "for the maintenance of the peace and security of the Continent." The "use of armed force" is specifically authorized, though "no State shall be required to use armed force without its consent."

On October 23rd, the Organ of Consultation met, in accordance with the Treaty procedures, and considered the evidence of the secret introduction of Soviet strategic nuclear missiles into Cuba. It concluded that a situation existed which endangered the peace of America. It recommended that Member States "take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military materiel and related supplies . . . ." The quarantine was imposed to carry out this recommendation.

Action by regional organizations to keep the peace is not inconsistent with the United Nations Charter. On the contrary, the Charter assigns an important role to regional organizations in carrying out the purposes of the United Nations. Article 52(1) prescribes the use of "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for

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regional action . . . ." And it is certainly not irrelevent in the present context that provisions dealing with regional organizations were written into the Charter at San Francisco at the insistance of the Latin American countries and with the Inter-American System specifically in mind.

The activities of regional organizations, of course, must be "consistent with the purposes and principles of the United Nations." It may seem self-evident that action to deal with a threat to the peace meets this requirement. But the principles of the United Nations are stated in Article 2 of the Charter and include the undertaking of all Members to

> ". . . refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The quarantine action involves a use of force and must be squared with this principle.

The promise not to use force is not absolute. One qualification comes readily to mind. Article 51 affirms that nothing in the Charter, including Article 2(4), impairs "the inherent right of individual or collective self-defense if an armed attack occurs." The quarantine action was designed to deal with an imminent threat to our security. But the President in his speech did not invoke Article 51 or the right of self-defense. And the OAS acted not under Article 3, covering cases of armed attack, but under Article 6, covering threats to the peace other than armed attack.

Self-defense, however, is not the only justifiable use of force under the Charter. Obviously, the United Nations itself could sanction the use of force to deal with a threat to the peace. So it did in Korea and in the Congo. We accept use of force in these instances as legitimate for two reasons. First, all the members have constituted the United Nations for these purposes. In signing the Charter they have assented to its powers and procedures. Second, the political processes by which the UN makes a decision to use force give some assurance that the decision will not be rashly taken.

I submit that the same two factors legitimize use of force in accordance with the OAS resolution dealing with a threat to the peace in the hemisphere. The significance of assent is attested by the fact that though Cuba is now and has been for some time the object of sanctions and hostility from the OAS, and has been suspended from participation in its agencies, she has remained a party to the treaties and a member of the Inter-American System, as, in a like case, did the Dominican Republic. The significance of the political processes in the Organization is atteste by the fact that, despite the disproportion of power between the United States and its neighbors to the south, it was not until the danger was clear and present that the necessary majority could be mustered to sanctio use of armed force. But when that time came, the vote was unanimous.

Some have asked whether we should not first have gone to the Security Council before taking other action to meet the Soviet threat in Cuba. And I suppose that in the original conception of the United Nations, it was thought that the Security Council would be the agency for dealing with situations of this kind. However, the drafters of the Charter demonstrate their wisdom by making Security Conncil responsibility for dealing with threats to the peace "primary" and not "exclusive". For events since 194

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have demonstrated that the Security Council, like our own electoral college, was not a viable institution. The veto has made it substantially useless in keeping the peace.

The withering away of the Security Council has led to a search for alternative peace-keeping institutions. In the United Nations itself the General Assembly and the Secretary General have filled the void. Regional organizations are another obvious candidate.

Regional organizations, even when they employ agreed processes and procedures, remain subject to check. They are subordinate to the UN by the terms of the Charter, and in the case of the OAS, by the terms of the relevant inter-American treaties themselves. Like an individual state, it can be called to account for its action in the appropriate agency of the parent organization. In recognition of this relation, the President ordered that the case be put immediately before the Security Council. The UN, through the Council and the Secretary-General is, as a result, actively engaged in the effort to develop a permanent solution to the threat to the peace represented by the Soviet nuclear capability in Cuba.

You will not have failed to see that the legal defense of the quarantine I have outlined reflects what I would call an American constitutional lawyer's approach to international law.

There is normative content in the system: "Congress shall make no no law . . . abridging the freedom of speech or of the press." "Member States shall refrain in their international relations from the threat or use of force". But it recognizes that norms, to be durable, must be subject to growth and development as circumstances change.

For assurance of healthy decision within the range of this ambiguity, there must be reliance upon insitutional arrangements, checks and balances. And therefore we must worry about the reality of the assent reflected in those arrangements.

There is recognition that in public international law, as in our domestic constitutional system, the membrane that separates law from politics is thin and permeable. And there must therefore be professional vigilance so that law is not corrupted by raison d'etat.

The consequence of having a system with this kind of "play in the joints" is that we must live without the certainty, provided by more formal systems, that we have done well. Vindication or failure of the work of the lawyer, like that of the politician and other artists, must await the riper judgment of history. I am content to submit our efforts these past weeks to that judgment. I have some confidence, perhaps reflecting my parochial bias, that in the final decision the rigor of the logician will be tempered by the working precepts of the American constitutional lawyer.

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